SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 230

EDWIN R. LEWINSON,

Appellant,

—against—

ROBERT J. CREWS, as County Clerk, Kings County,

Appellee.

ON APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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Appellee, Robert J. Crews, as County Clerk, Kings County, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal from a State Court upon ground that it does not present a substantial federal question, and is not within the jurisdiction of the Court, and was expressly passed upon, and that the judgment rests on an adequate non-federal basis.

Opinions

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department reported in 28 A.D. 2d 111, was affirmed by the Court of Appeals, upon the majority opinion of the Appellate Division, reported in 21 N.Y. 2d 898, and appear as Appendix A and Appendix B to appellant's jurisdictional statement.

Jurisdiction

Appellant invokes the jurisdiction of the Court pursuant to 28 U.S.C. Section 1257 (2).

Statute Involved

Judiciary Law of New York Section 596.

Question Presented

Whether Section 596 of the Judiciary Law of New York as passed upon by the Courts of New York is contrary to the Fourteenth Amendment of the Constitution of the United States.

Statement

Petitioner appeared at the Division of Jurors of the County Clerk of Kings County on May 21, 1965 to be examined as to his qualifications to be a juror.

A questionnaire must be completed by each prospective juror, in his own handwriting, in form, as provided by Rule 17, Rules Of The Jury System In The City of New York.

Questions numbered "16" and "17" of such form are set forth in part:

16. Are you physically disabled or incapacitated ..... Is your hearing or eyesight so impaired that you could not intelligently follow a case in Court .....

17. If your answer to any question on line "16" is "Yes", give all particulars .....

Petitioner did not fill out above or any part of questionnaire.

He is totally blind.

He was rejected as a juror because of his inability to complete the questionnaire and his blindness.

A proceeding to Review the Determination of the Court Clerk, rejecting the Petitioner, was dismissed by Special Term. 49 Misc. 2d 1050, 269, N.Y.S. 2d 185.

The judgment was affirmed by the Appellate Division 28 A.D. 2d 111, 282 N.Y.S. 2d 83 and by the Court of Appeals 21 N.Y. 2d 898, 289 N.Y.S. 2d 619.

ARGUMENT

I

Appellant does not meet statutory requirements that he be in possession of his natural faculties and not infirm or decrepit.

In order to be qualified to serve as a juror a person must comply with Section 596 of the Judiciary Law.

Subdivision 4 (now subdivision 3) of said Section requires that a person must be in the possession of his natural faculties and not infirm or decrepit.

Commonly understood as synonymous with the five senses, "Faculty" is defined in Webster's New International Dictionary, Second Edition, Unabridged, as "a physical capability, power of function:—now esp. of the human body or its organs; as the faculty of hearing."

There is a presumption that words in a statute or regulation are to express a particular idea. It must be accepted that the legislature intended that "natural faculties" should include the sense of sight.

The language in Subdivision 4 is thus free of ambiguity, and the County Clerk's conclusion that petitioner was not

in possession of his natural faculties because of his blindness, so as to qualify him as a juror was reasonable and proper.

A person who is totally blind does not have his natural faculties within the purview of the statute.

II

The statute is not unconstitutional because there is a rational basis for the barring of blind people.

The conclusion reached by the County Clerk was reasonable and founded upon a completely rational basis, and is well suited to the administration of the jury system.

On an appeal involving issues of fact or credibility the Appellate Courts give great weight to the determination of the trier of the facts because he sees the witnesses, while the Appellate Courts see only the cold printed record. Even more important than seeing the witness is the seeing of exhibits like photographs, diagrams, writings and models, in cases where words cannot adequately picture the subjects or there are disputes as to what the exhibits show or mean, or there are claims of forgery or alteration of documents.

There is no Constitutional issue involved herein, it is one entirely of statutory interpretation.

The County Clerk must have considerable latitude to cope with matters of ascertaining qualifications of prospective jurors, and where his determination is reasonable, and founded upon a rational basis, it is neither arbitrary nor contrary to law, nor does it violate the Constitution.

It is well established that legislative enactments carry a strong presumption of constitutionality and that unconstitutionality must be demonstrated beyond a reasonable doubt before judicial findings of invalidity may be made.

This section prescribing the qualifications of jurors in cities having a population of one million or more is applicable with respect to qualifications of grand and petit jurors of Federal District Court for the Southern District of New York. *United States* v. *Foster,* D.C. N.Y. 1949, 83 F. Supp. 197.

III

Inability to read and write English language understandably disqualifies a juror.

The requirement of Subdivision 6 (now Subdivision 5) of Section 596 of the Judiciary Law is not met by the appellant.

A person is blind when he lacks the sense of sight by natural defect or deprivation.

While the appellant may be able to write in the English language, he presumably cannot read in the English language. He most certainly can read in Braille, a system of writing for the blind that uses characters made up of raised dots. Surely this cannot be construed as the English language.

The determination by the County Clerk upon this ground is founded upon a rational basis and is a proper interpretation of the statutes, and the rules adopted by the Appellate Division.

IV

Federal law and New York law are substantially the same.

The provisions of Section 596 of the Judiciary Law, of New York, as amended, effective September 1, 1967; and the federal Jury Selection and Service Act of 1968, approved March 27, 1968 (Section 1865(b)) set forth the

same standards for the qualification requirements of jurors.

In an article in the Brooklyn Barrister Volume 19, Number 6 at page 199, the Honorable Emanuel Celler, Chairman of the Judiciary, United States House of Representatives, reporting on the Federal Jury Selection and Service Act states as follows:

> "Wisely, the bill as passed preserves discretion in the Court to disqualify prospective jurors who are either physically or mentally infirm, or where service would tend to prejudice the secrecy of the jury deliberation."

CONCLUSION

The construction of Section 596 of the Judiciary Law of New York by the State Court, does not violate the Constitution of the United States.

Dated: July , 1968

Respectfully submitted,

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APPENDIX A

JURY SELECTION AND SERVICE ACT OF 1968
PUBLIC LAW 90-274, 82 Stat. 53

SECTION 1865

"(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he——

"(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

"(2) is unable to read, write and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

"(3) is unable to speak the English language;

"(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

"(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty." Approved March 27, 1968.

APPENDIX B

JUDICIARY LAW OF NEW YORK (MCKINNEYS CONSOLIDATED LAWS OF NEW YORK BOOK 29)

SECTION 596

"In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

1. Be a citizen of the United States, and a resident of the county.

2. Be not less than twenty-one, nor more than seventy-five years of age, provided however, that a person between seventy and seventy-five years of age shall be excused at the request of any party to the action and such request shall not constitute a peremptory challenge.

3. Be in the possession of his natural faculties and not infirm or decrepit.

4. Not have been convicted of a felony or a misdemeanor involving moral turpitude.

5. Be intelligent; of sound mind and good character; well informed; able to read and write the English language understandingly.

A person dwelling or lodging or having or maintaining a dwelling or lodging in a county for the greater part of the time between October first and June thirtieth next thereafter, is a resident of that county, within the meaning of this section. Added L. 1940, c. 202 § 1; amended L. 1967, c. 49 § 1; L. 1967, c. 548, § 1, both eff. Sept. 1, 1967."

HISTORICAL NOTE

Subd. 2, amended L. 1967, c. 548 § 1, eff. Sept. 1, 1967, which substituted "seventy five" for "seventy" and added "provided however * * * peremptory challenge."

Subd. 3, formerly 4, renumbered 3, L. 1967, c. 49, § 1, eff. Sept. 1, 1967. Former subd. 3, which required ownership of property valued at $250.00, was omitted L. 1967 c. 49 § 1, eff. Sept. 1, 1967.

Subds. 4, 5 formerly 5, 6, renumbered 4, 5, respectively L. 1967, C. 49 § 1 eff. Sept. 1, 1967.

Former subds. 4, 5 renumbered 3, 4.

Former subd. 6, renumbered 5.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

LEWINSON *v.* CREWS.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 230. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.